In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1101

JOHN MARTIN SWORDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1973. The petition for a writ of certiorari was filed on February 3, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether each defendant in a joint trial was entitled to ten peremptory challenges.

2. Whether petitioner was properly denied a severance.

3. Whether the accomplice-witness was properly allowed to be seated next to government counsel during peti-

tioner's testimony; whether the accomplice was properly allowed to testify on rebuttal; and whether the trial court properly instructed the jury as to the weight to be given the testimony of this witness.

4. Whether references to photographs of petitioner, which were displayed during pre-trial identification of co-defendants, necessitated reversal.

5. Whether the prosecution was properly allowed to cross-examine petitioner regarding a prior criminal conviction to which he testified on direct examination.

6. Whether there was an undisclosed pre-trial agreement regarding the disposition of the charges against the accomplice-witness.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of having aided and abetted the robbery of a federally insured bank in violation of 18 U.S.C. 2113(a), (b) and (d) and 2 and of having received the proceeds of a bank robbery in violation of 18 U.S.C. 2113(c). See *United States* v. *Coleman*, 340 F. Supp. 451 (E.D. Pa.). He was sentenced to fifteen years' imprisonment and the court of appeals affirmed (Pet. App. A).[1]

The evidence showed that on July 14, 1970, two armed men robbed the Industrial Valley Bank and Trust Company of Pottstown, Pennsylvania. The men, who were wearing white hoods, entered the bank and while one stood guard in the lobby, the other collected money from each teller (Tr. 20-24, 43-47, 53-59).[2]

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[1]Co-defendant Dennis Coleman was tried with petitioner and was likewise convicted of bank robbery. On a separate appeal his conviction was affirmed.

[2]"Tr." refers to the transcript of the trial proceedings, contained in three volumes paginated consecutively.

The full details of the robbery, and petitioner's participation in it, were elicited from Girard Lamoreaux, petitioner's accomplice, who testified as to the entire plan, including petitioner's solicitation of his participation, petitioner's purported motive for planning the robbery and the actual details of the robbery[3] (Tr. 208-244). The testimony of Lamoreaux was corroborated by other witnesses. J.C. Smolik, who was outside of the bank at the time of the robbery, identified co-defendant Coleman and Girard Lamoreaux as the men who entered the bank. She observed Coleman and Lamoreaux don the hoods, enter the bank and then flee (Tr. 71-77). Another witness, C.L. Endy, testified that Coleman and Lamoreaux were in the vicinity of the bank on the day of the robbery. He stated that the two men arrived in an area near the bank in a single car and then hurriedly departed in separate cars (Tr. 88-97). Additionally Michael Dantonio, Lamoreaux's roommate and cousin, testified that petitioner discussed the robbery with him and tried to enlist his participation. Dantonio was also present when petitioner and Lamoreaux returned from the bank with money bags and guns in their possession (Tr. 127-140).

ARGUMENT

1. Petitioner contends that the trial court erred in not granting him ten separate peremptory challenges on *voir dire* of the jury. As stated in Rule 24(b), Fed.R.Crim.P., joint defendants are allowed a total of ten peremptory challenges except when the court concludes it appropriate to allow more. Petitioner now asserts, without explanation, that there was a conflict of interest among the co-defendants and that each attorney planned a separate defense

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[3]Although Lamoreaux was initially charged with petitioner and Coleman, the indictment against him was later dismissed on motion of the government.

with "a different goal in mind" (Pet. 6). The record does not disclose a basis for petitioner's allegation that ten challenges for each defendant were necessary. Moreover, the trial court, in fact, allowed two additional challenges to the defendants.

2. Petitioner claims that the denial of severance by the trial court was a "clear abuse of discretion which resulted in a great prejudice to petitioner's right to a fair trial" (Pet. 7). In support of this claim he alleges that evidence against co-defendant Coleman was much stronger than that against him and that each co-defendant planned a separate defense. As the district court held, however, this is not a sufficient showing of an improper joinder on the part of petitioner. See *United States* v. *Coleman, supra,* 340 F. Supp. at 452. It is settled that when two or more defendants are charged with the same offense, they should be tried jointly except when the most substantial reasons require separate trials. 1 Wright, *Federal Practice and Procedure,* §§ 223, 227 (1969); *Golliher* v. *United States,* 362 F. 2d 594 (C.A. 8); *United States* v. *Lipowitz,* 407 F. 2d 597 (C.A. 3), certiorari denied *sub nom. Smith* v. *United States,* 395 U.S. 946. Contrary to petitioner's claim, there was no great disparity between the evidence elicited against petitioner and Coleman. The evidence against each was compelling.

3. Petitioner advances a variety of contentions about accomplice-witness Girard Lamoreaux (Pet. 8-11).

a. During petitioner's testimony, witness Lamoreaux was seated at the prosecution's table in order to confer with the prosecutor. The district court overruled defense counsel's objection to this procedure, but carefully instructed the jury (Tr. 461):

> **The Court:** Ladies and gentlemen of the jury, I have permitted a witness for the prosecution to sit at

counsel table during the questioning of the next witness because I believe it will facilitate the handling of this case.

I do not want you by reason of that fact to consider the witness as part of the prosecution no more [sic] than if he had appeared as he has, and which he may do later, as a witness in this action. In other words, you do not add any additional credit to his testimony when he testifies by reason of the fact that he conferred with Mr. McBride during the trial. Do you understand that?

The Jury: Yes.

These cautionary instructions as well as the instructions given in regard to Lamoreaux's testimony, see *infra,* eliminated any possible prejudice to petitioner resulting from Lamoreaux's presence at the table. See, generally, *Spencer* v. *Texas,* 385 U.S. 554, 565; *Frazier* v. *Cupp,* 394 U.S. 731, 735.

b. Petitioner claims that it was improper to allow Lamoreaux to testify on rebuttal as to petitioner's reason for undertaking the bank robbery. Lamoreaux had testified during the prosecution's case-in-chief that petitioner wanted to rob the bank to obtain money to open a business (Tr. 210, 239-240). Thereafter, when Lamoreaux again testified on rebuttal, he stated that he entered into the agreement to rob the bank "so that [petitioner] could get money." He stated that he agreed to the robbery because he was obligated to petitioner due to prior dealings (Tr. 537-538). There is no merit to petitioner's claim that this was beyond the scope of proper rebuttal. This testimony was initially brought out during the government's case. It was only reiterated on rebuttal; it was occasioned by petitioner's intervening testimony denying participation in the robbery

(see Tr. 484). Moreover, in light of the other evidence, Lamoreaux's testimony on rebuttal could hardly have affected the verdict.

c. Regarding the testimony of Girard Lamoreaux, the court charged (Tr. 628):

> You have heard testimony from Jerry Bryant Lamoreaux, who testified he was the accomplice of these two defendants in this crime. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though his testimony should not be corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care.

Petitioner now asserts that this cautionary instruction was inadequate, and that the jury should have been told to "scrutinize" Lamoreaux's testimony with care. The fine distinctions between the phrases "weigh with great care" and "scrutinize with great care," which petitioner seeks to draw on appeal, were not called to the trial judge's attention when he asked for exceptions to the charge (Tr. 635-637). While we submit that the charge was adequate, it clearly does not constitute "plain error."

4. At trial, witnesses Smolik and Endy, during cross-examination by co-defendant Coleman's counsel, disclosed that during a pre-trial photographic identification, petitioner's picture appeared in the array of photographs presented to them. In each instance, petitioner's request for a mistrial was denied (Tr. 83-85, 101-103). He now claims (Pet. 11-15) that the eliciting of the fact that his picture was among those shown to Smolik and Endy was

prejudicial in that the jury could infer that the photographs were taken during petitioner's prior incarceration. This claim is without merit. While the testimony came in response to questions posed by counsel for petitioner's co-defendant, rather than the prosecution, at no time were the photographs identified as prison photographs or "mug shots." Moreover, petitioner's counsel questioned petitioner on the stand about a prior conviction for illegal possession of a firearm (Tr. 465-467).[4] Any error in the admission of the testimony at issue here was, therefore, harmless.

5. The indictment against Girard Lamoreaux, who testified against petitioner and co-defendant Coleman, was dismissed after petitioner's trial. Petitioner alleges that this fact, as well as the severance of Lamoreaux from the other co-defendants, established the existence of a pretrial "deal" which should have been disclosed to the jury (Pet. 20-23). Contrary to his claim, the record shows that neither promises nor threats were made to Lamoreaux and that he testified without an agreement that "anything favorable" would be done by the government on his behalf (Tr. 207-208).

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[4]Following petitioner's testimony regarding his prior conviction for a violation of the Firearms Act, counsel for the government questioned him concerning that conviction (Tr. 494-497). Petitioner contends that this cross-examination was collateral and therefore prejudicial. It is settled, however, that a prior conviction testified to on direct may be pursued on cross-examination. *E.g., United States* v. *Sisk*, 390 F. 2d 652 (C.A. 4); *Newman* v. *United States*, 331 F. 2d 968 (C.A. 8), certiorari denied, 379 U.S. 975; *United States* v. *Countryman*, 311 F. 2d 189 (C.A. 2). Government counsel merely asked petitioner for further details of the incident which petitioner himself first disclosed (Tr. 495). This effort to clarify petitioner's direct testimony was clearly proper. In any event, a comparison of the direct testimony and the allegedly improper cross-examination indicates that petitioner could not possibly have been prejudiced by the additional inquiries.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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